85-1552

Supreme Court, U.S.
FILED
JAN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

E. H. MOSHER, SR.
PETITIONER

VS.

INTERNAL REVENUE SERVICE, et al
CENTRAL REGION SERVICE CENTER
COVINGTON, KENTUCKY 41019

DONALD REGAN, SECRETARY
UNITED STATES TREASURY DEPARTMENT

PATRICK J. RUTTLE, DIRECTOR
ABOVE IRS CENTER

BRUCE A. SETTELL, CHIEF
ABOVE IRS CENTER

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AS AMENDED

E. H. MOSHER, SR.
PETITIONER
REPRESENTING HIMSELF
5301 SPRINGLAKE PARKWAY #403
HALTOM CITY, TEXAS 76117
817/485-5478 RESIDENCE
817/280-2054 OFFICE

S/PP

QUESTIONS PRESENTED FOR REVIEW

1. Are the Federal courts and the Department of Justice now empowered to deny the people their right to a public trial according to the rules of common law, whether or not a jury trial has been demanded, on a pretext that "There Are No Genuine Issues" in the citizen's case pursuant to motions for dismissal and summary judgment under Rules 12(b) and 56 of the Federal Rules of Civil Procedure notwithstanding other such rules, statutes, and constitutional provisions to the contrary?

2. Are Rules 12(b) and 56 of the Federal Rules of Civil Procedure, as applied to the petitioner in this case, violative of his right to due process of law, and his right to trial by jury, or have such "Rules" superceded Amendments I, IV, V, VII and XIV of the United States Constitution?

3. Are the actions by the judges of the courts below and the attorneys furnished by the Department of Justice to represent the

defendants, in dismissing the petitioner's case and granting summary judgment to the defendants by means of FRCP 12(b) and 56 motions without a hearing or a trial on the issues involved, violative of 26 USC §6703, or 42 USC §1983 of the United States Code of Statutes?

4. Are the courts and the Department of Justice still bound to uphold and defend the Constitution of the United States, including all of the rights of the people written therein, as stated in Article VI, Section 1, paragraph 2 on the Supreme Law of the Land?

5. Are the people to enjoy the alleged benefits of "Rule by Law", or is that doctrine reserved for agents of the government in conflicts against the citizens?

6. Is 26 USC §6702, on "Frivolous" tax penalties, vague and ambiguous as applied to the petitioner in this case and is said section, therefore, unconstitutional?

7. Are 26 USC §6061 and §6065 on signing and verifying tax returns under penalty of perju-

ry, as applied to the petitioner in this case, violative of any of his rights under Amendments I, IV, V or other provisions of the United States Constitution?

8. Can the defendants, acting under color of their administrative authority, lawfully compel the petitioner to sign any statement against his own free will and discretion?

9. Does this Court agree that the petitioner's 1982 tax return at issue herein does contain all of the information necessary to compute the tax liability thereon and is, therefore, a valid return for such purpose after carefully considering that all taxpayers are required to make honest tax returns subject to penalties for fraud under 18 USC § 287 and §1001.....even though the "Jurat" thereon may be deleted.....and the fact that an attorney for the defendants has admitted that the "....return appears to have been filled out properly in all respects..."

10. Can this Court, in good conscience, say that the petitioner should be held liable for

the subject tax penalty as prescribed in 26 USC §6702 after considering all of the facts of this case, and all of the petitioner's arguments of law and of common sense?

11. If the petitioner is found to be liable for the $500.00 penalty assessment at issue herein, must he also forfeit the $2,043.85 refund claimed on his 1982 tax return on the pretext of the defendants that deletion of the "Jurat" thereon demonstrated an intent to thereby negate all of the entries on said return and, if so, would that not constitute an increase of said penalty not authorized by Congress?

12. Are the judges of the courts below and the Department of Justice attorneys for the defendants answerable by their oaths of office for false and misleading statements, and for their incompetent and prejudicial acts during the conduct of their offices in this case when such conduct has been manifestly contrary to the rights of the petitioner and of the people in general?

TABLE OF CONTENTS

Questions Presented For Review	i
Table of Contents	iv
List of Authorities	v
Petition	1
Opinion Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	7
Selected Case Law Citations	32
Reasons for Granting the Writ	44
Conclusion	45
Certificate of Service	46
Appendix A: Opinion of Fifth District Court of Appeals	
Appendix B: Opinion & Order of Fort Worth District Court	
Appendix C: Copy of Page 3 of Appellee's Brief to Ct. of Appeals	
Appendix D: Copy of Pages 1 & 2 of Appellant's Brief to Ct. of Appeals	
Appendix E: Constitutional Citations	
Appendix F: Rules 38 & 39 of the Federal Rules of Civil Procedure	

TABLE OF CITATIONS

	Page No.
UNITED STATES CONSTITUTION: Article VI, Section 1 Amendment I Amendment IV Amendment V Amendment VII Amendment XIV	App E-1 to 3
FRCP 38 and 39	App F-1 to 3
26 USC 6703: Rules Applicable to 6702 Penalties.	Pg. 4
Garner Vs US, 424 US 648 (1976) S Ct 1178	Pgs. 9, 12, 15 & 35
US Vs Bishop, 412 US 346 (1973) S Ct	Pg. 37
Miller Vs US, 230 F 486 at 489	Pg. 16
Sherar Vs Cullen, 481 F 2d 946 (1973) 9th Cir	Pg. 16
US Vs Lombardo, 228 F 980	Pg. 37
Miranda Vs Arizona, 380 US 436 (1966) S Ct	Pg. 40
Simmons Vs US, 390 US 389 (1968) S Ct	Pg. 41
Marchetti Vs US, 390 US 39 (1968) S Ct	Pg. 42
Grosso Vs US, 390 US 62 (1968) S Ct	Pg. 42
Marbury Vs Madison, 5 US (1 Cranch) 137, 174, 176 (1803)	Pg. 43
Internal Revenue Form 1040 and the Fifth Amendment: Self-Reporting or Self-Incrimination, The Taxpayer's Dilemma, 54 ND L Rev 213, 1977.	Pg. 40

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CASE NO. _____

E. H. MOSHER, SR.
Petitioner

Vs.

INTERNAL REVENUE SERVICE, et al

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AS AMENDED

The petitioner, E. H. MOSHER, SR., requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit which was entered on October 31, 1985.

OPINION BELOW

On October 31, 1985, the Court of Appeals entered a Memorandum Decision affirming the Order of the District Court which had granted summary judgment to the defendants on

an FRCP 12b and 56 Motion for Dismissal which falsely contended that there are no genuine issues in this case so as to unlawfully deprive the plaintiff of a trial by jury according to the rules of common law as demanded and as provided by 26 USC §6703, FRCP Rules 38 and 39, and Amendment VII of the United States Constitution. A copy of the Opinion by the Court of Appeals is attached herewith as Appendix A, and the Opinion and Order of the District Court is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court to review the subject appeal is established by 28 USC § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner hereby contends as follows:

1. that 26 USC §6702, as applied to the petitioner, is vague and ambiguous in that an ordinary person cannot reasonably be expected to determine from a

reading thereof just what constitutes lawful or unlawful action before the facts of the matter, and said section is, therefore, Constitutionally null and void and of no legal effect.

2. that, whether or not the Court may find 26 USC §6702 above cited to be vague and ambiguous, (a) the petitioner has not acted in violation of any part of said section, and (b) no part of said section relevantly or materially pertains to deletion of the form 1040 "Jurat" because of which the defendants have erroneously issued the subject penalty assessment under said section. Furthermore, the arguments of the defendants in support of said penalty are mere allegations and fall far short of meeting the burden of proof imposed upon them by 26 USC §6703.

3. that 26 USC §6061 and §6065, which

act to compel the petitioner to sign the offensive "Perjury Statement", or "Jurat" on the Federal form 1040 income tax return and associated documents, contrary to his own free will and discretion, are violative of the Right of Freedom of Speech as guaranteed by Amendment I of the United States Constitution and, therefore, are null and void and of no legal effect.

4. that 26 USC §6061 and §6065, by reason of the compulsion cited in 2. above, are also violative of the petitioner's Right Against Self-Incrimination as guaranteed by Amendment V of the United States Constitution and are, therefore, null and void and of no legal effect.

5. that 26 USC §6061 and §6065, by reason of the compulsion cited in 2. and 3. above, are also violative of the petitioner's Right to be Secure in

his Person, Papers and Effects as guaranteed by Amendment IV of the United States Constitution and are, therefore, null and void and of no legal effect.

6. that the judges of the courts below, and the attorneys of the Department of Justice who have represented the defendants in this matter, have made numerous false statements, spurious arguments, and gross errors so as to deny the petitioner a trial on the issues as provided by 26 USC §6703 and otherwise established law, and have thereby acted in violation of the petitioner's Right to Due Process of Law as guaranteed by Amendment V of the United States Constitution and should be prosecuted for perjury and removed from office forthwith for such misconduct.

7. that the judges of the courts be-

low, and the Justice Department attorneys for the defendants, by their conduct cited in 6. above, have also acted in violation of the petitioner's Right To Trial by Jury as guaranteed by Amendment VII of the United States Constitution and should be removed from office forthwith for such misconduct.

8. that the judges of the courts below, and the Justice Department attorneys for the defendants, in their conduct of this case, have acted in gross derogation of the petitioner's rights contrary to 42 USC §1983 and Amendment XIV of the United States Constitution and should be held liable therefore.

9. that the judges of the courts below, and the Justice Department attorneys for the defendants, in their conduct of this case, have acted contrary to their oaths of office to uphold and

> defend the Constitution of the United States, as well as contrary to Article VI, Section 1 of said Constitution and should be removed from office forthwith for such misconduct.

Copies of the above cited Constitutional Section and Amendments are attached herewith as Appendix E. Also, copies of Rules 38 and 39 of the Federal Rules of Civil Procedure are attached herewith as Appendix F.

STATEMENT OF THE CASE

This case began when the defendants issued a notice of a $500.00 penalty assessment dated June 27, 1983 which alleged that the petitioner had filed a "Frivolous" income tax return for the 1982 tax year in violation of 26 USC §6702. Upon fulfilling all of the administrative requirements involved, this taxpayer filed a suit in the Federal District Court of Fort Worth, Texas as provided in 26 USC §6703 in order to contest his liability

for said assessment, and demanded a trial by jury in the original complaint to that court as provided by FRCP 38 & 39 and Amendment VII of the United States Constitution. Section 6703 commences as follows:

> 26 USC §6703: Rules Applicable to Penalties Under Sections 6700, 6701, and 6702.
>
> > (a) Burden of Proof. In any proceeding involving the issue of whether or not any person is liable for a penalty under sections 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.

It is, therefore, perfectly clear that the outstanding issue of this case as spelled out in the above statute is, "Whether or not this petitioner is liable for the penalty prescribed in section 6702 as alleged by the defendants", and the burden of proof is clearly on the Secretary and his agents (the co-

defendants). There is no guess-work involved as to the intent of Congress in connection therewith. Congress obviously meant to assure by that statutory enactment that any person charged with a violation of Section 6702 would enjoy the right to a speedy and public trial in the Federal District Court according to the Rules of Common Law, which includes the right of trial by jury upon demand.

After this case was docketed in the above court, the petitioner received a series of threatening letters from the defendants and filed a Motion for Injunctive Relief which was subsequently denied by the judge of that court in an order fraught with errors and false and misleading statements indicative of gross incompetence and extreme prejudice. The petitioner thereupon filed a Motion for a Change of Venue consisting of six pages which severely criticized the conduct of said judge in connection therewith, as well as for the reason that he (the petitioner) had moved to

another state 1,700 miles from Fort Worth. Immediately thereafter, said judge issued an Order denying any hearing on the matter and then granted the defendant's FRCP 12b and 56 Motion for Dismissal and Summary Judgment in an Order fraught with the same kind of errors, false and misleading statements, incompetence and prejudice. But said judge neglected to take any action or even make any comment on the above Motion for a Change of Venue, which certainly should be investigated by this Court to determine whether the opinions, decisions and orders of said judge are legally valid under these circumstances.

The petitioner thereupon timely filed his appeal with the Fifth Circuit Court of Appeals and, in the subsequent briefs, clearly and unequivocally set forth the salient issues in this case, together with an outstanding plea that this case be remanded to the district court for a trial by jury. But, the judges of the Court of Appeals utterly failed to address any of the petitioner's issues (not

even the issue spelled out by Congress in 26 USC §6703 as above cited) and summarily affirmed the lower court's "Opinion". Furthermore, said judges have repeated and endorsed false and misleading statements in their "Opinion" which have been thoroughly identified as such in the petitioner's briefs to that court.

In particular, the attention of the Court is directed to the lines on page 411 of said "Opinion" (Appendix A-2) which reads as follows:

> "The IRS informed Mosher that the form 1040 could not be processed because it was not properly signed under penalties of perjury and requested that he sign an attached jurat. Mosher refused and the IRS assessed a $500.00 penalty pursuant to 26 USC §6702."

The above statement was taken directly out of the Appellee's Brief to the subject court as shown in Appendix C herewith, which is repro-

duced from a copy of said brief. The sequence of events indicated in the above statement are out of order and the facts have been misrepresented in such a manner as to obviously invoke prejudice by the court against the petitioner. The true facts are shown in Appendix D herewith, which has been reproduced from the Appellant's Final Brief to said Court. Note that said penalty assessment was summarily issued BEFORE the letter pertaining to the "Jurat", and both documents are in the record of the court with the dates shown thereon. Also note that the petitioner replied to both documents with questions which the defendants neglected to answer, and that the petitioner did not "REFUSE' as falsely alleged by both the defendants and the judges of the court of appeals. All this was covered in the beginning of the petitioner's Final Brief to that court and it is evident that the judges of that court have either willfully repeated a grossly false statement concocted by the defendants attorneys, or they have failed to

read the petitioner's brief before deciding this case. In any event, the petitioner contends that the subject false statement constitutes prejudicial error on the part of the judges of the Court of Appeals, contrary to his interests and rights according to law.

On page 412 of the subject "Opinion", under II, the court cites the following from Ernst Vs. General Motors:

> "The party who defended against the motion for summary judgment must have his allegations taken as true and must receive the benefit of the doubt when his assertions conflict with those of the movant".

On the face of the above statement alone, this case should be remanded to a district court for trial by a jury because said court of appeals has not accepted ANY of the petitioner's allegations as true or given him the benefit of the doubt on anything at all, although they had 38 pages of solid facts and

arguments in his First Brief and 18 more in the Final Brief which were before them.

In the case of Lucas Vs. Pilliod Lumber Co. cited on page 414 of said "Opinion", the decision of the court pertaining to the signing of the "Jurat" applied only to Officers of Corporations and does not apply to individual citizens, and it appears that the Constitutionality of 26 USC §6065 has never been tested in this court in regard to individual citizens. Misleading, to say the least. But the Court now has the opportunity to do so since the petitioner has challenged said section for due cause.

Concerning Arnett Vs. Kennedy on pages 414 and 415, the subject decision on "Vagueness" was a wholly unrelated case, which has no similarity to 26 USC §6702. It should be obvious to this court that the judges of the court of appeals are thereby behaving merely as parrots and have given no serious consideration whatsoever to the petitioner's conten-

tions on the ludicrous vagueness of 26 USC § 6702. In fact, that court admits that they have not addressed this issue by the statement on page 413 (Appendix A) of the opinion which reads as follows: "[2] Although this Court has not interpreted section 6702 in the context of this specific conduct, Mosher's conduct appears to fall directly within the prohibitions of the statute." The petitioner insists that the vagueness of said section must be thoroughly reviewed and properly adjudicated in the interests of justice in this case. That court has abdicated their duty in failing to "Interpret" said section and have, instead, used it to destroy the petitioner's case.

The statement on page 414 of said "Opinion" that, Mosher was not denied a right to a jury trial since no genuine issue of fact remained that required a trial" is the stuff that revolutions are made of. The petitioner has made a valid challenge on the unconstitutionality of 26 USC § 6061, 6065 and 6702 and

news reports said that more than 300 taxpayers had filed similar suits in the Federal district courts for "Frivolous" tax penalties per 26 USC §6702 and 6703, and that every last one of them had been dismissed under the same FRCP 12b and 56 motions above cited, thereby depriving all such taxpayers of their right to any trial, with or without a jury. It is, therefore, evident that the "Justice" Department and the courts are engaged in an organized campaign.....to be most precise, call it a conspiracy..... to destroy the rights of the people to any trial in which IRS, and possibly other government agencies are parties in the action.

The petitioner certainly believes that every one of the judges, and the IRS and Justice Department lawyers who have acted against the 26 USC § 6702 appeals do know full well what the issues are in these cases, commencing with due appreciation that the statute cited is undoubtedly one of the most vague and ambiguous buckets of fish ever perpetrated by

Congress. It is evident that said lawyers and judges dare not allow any of the "Frivolous" tax return cases to get in front of a jury lest the IRS "System" be irreparably damaged by the outcome. This situation amounts to willful refusal by said judges and lawyers to conduct the trials provided for by the Congress in 26 USC §6703. While the judges refuse to obey 6703, they nevertheless expect the taxpayers to obey 6061, 6065 and 6702, et al. Inconsistent, to say the least.

The original Notice of the subject "Frivolous" tax return penalty assessment issued by the defendants for an alleged violation of 26 USC §6702 was cryptically written and failed to state the real basis for the penalty. Subsequently, in the Motion for Dismissal and Summary Judgment via FRCP 12b & 56, the real basis for the penalty was established as an alleged violation of 26 USC § 6061 & 6065 pertaining to signing and verification of returns due to the petitioner's

long standing practice of deleting the "Perjury Statement", or so-called "Jurat" immediately above the signature line of the Federal form 1040 income tax return. Consequently, the defendants erroneously cited 26 USC § 6702 in order to invoke the penalty provision therein when the real basis for their allegations is the subject of 26 USC §6061 & §6065 apparently because the latter sections do not contain such a penalty. The defendants have then proceeded to construct a web of fabrications in an attempt to justify the use of 26 USC §6702, but have abjectly failed to show that the provisions cf said section are materially relevant to the conduct, or the motives of the petitioner who contends that he has committed no acts relevant thereto. Said section reads as follows:

> Sec. 6702. Frivolous Income Tax Return
> (a) Civil Penalty. .....If.....
> (1) Any individual files what purports to be a return of the tax imposed by subtitle A but which.....

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to....

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500.00.

The defendants contend that, because of deletion of the "Jurat", they cannot process the subject tax return, and that the petitioner is in violation of 26 USC §6702 paragraphs

(a)(1)(A), (a)(2)(A) and (a)(2)(B). Also, the judge of the district court has erroneously ruled that the entry, "Violates Amend. V of U.S. Constitution" typed immediately below the deleted "Jurat" is a non-allowable blanket negation of the entire tax return for the obvious purpose of lending credence to the allegation of (a)(1)(A) above.

In order to invoke the penalty provision of 26 USC §6702, the defendants must prove beyond a reasonable doubt that the subject taxpayer is in violation of at least one provision in each of paragraphs (1) and (2) above. The defendants have made no claim that the petitioner is in violation of (a)(1)(B) and, in fact, in the Motion for Dismissal their attorney wrote that, "The purported return appears to have been filled out properly in all respects except that a portion of the jurat above the plaintiff's signature was crossed out". The subject tax return consists of fourteen pages meticulously typed and accurately calculated down to the last penny,

every entry that could conceivably be required has been diligently made thereon, and the contention that the petitioner is in violation of (a)(1)(A) simply cannot stand exposure to the light of day, or to a jury, or to any enlightened judge who might get down to looking at the real facts of this case.

In both the District Court and the Court of Appeals, the petitioner cited Garner Vs. U.S., 424 US 648 (1976), 96 S Ct 1178 to establish conclusively that the Amendment V entry made on the subject tax return is in explicit accordance with the findings of this Court, and it is wrong for the judges of those courts to presume that said entry constituted a blanket negation of the entire return in the light of such findings, and without even inquiring as to whether the petitioner had any intention of making a blanket negation, which he certainly did not. This Court should take notice that the attorneys for the defendants did not make any contention that the petit-

ioner's use of the Fifth Amendment beneath the deleted "Jurat" constituted a blanket negation of the return. That contention was initiated solely by the "Judge" of the district court in his Opinion granting summary judgment to the defendants, and, when he did that, he ceased to be a Judge and became an attorney for the defendants and an adversary of this petitioner.

Furthermore, the petitioner filed an amended return for the 1983 tax year, after consulting with an IRS attorney, on which the "Jurat" was not deleted, but the Amendment V entry was made in the identical manner as on the 1982 return at issue here. The IRS attorney had advised the petitioner that no entry can be made which would have the effect of a blanket negation of the entire return in connection therewith. Shortly after filing said amended 1983 return, the defendants paid the refund in full which was due the petitioner as claimed thereon, thereby serving to confirm that the Amendment V entry made on the peti-

tioner's 1982 and 1983, and many prior returns does not constitute a blanket negation of the returns, contrary to the "Opinion" of the district court judge.

For at least twenty years prior to the enactment of 26 USC §6702, the petitioner regularly deleted the offensive "Jurat" and made the Amendment V entry on all of his Federal income tax returns, and IRS always managed to process such returns and more or less promptly made the refunds claimed thereon. Now the defendants contend that they cannot process such returns if the "Jurat" has been deleted pursuant to demanding a $500.00 penalty assessment. It should, therefore, be perfectly evident that the statement of the defendants that they "cannot process such returns" is literally incorrect considering the many years when they regularly did so without any comment but, rather, that they WILL NOT now do so in pursuit of $500.00 penalty assessments. For the defendants to

refuse to process a return is one thing, but to contend that the petitioner's 1982 tax return "does not contain information on which the substantial correctness of the self-assessment may be judged" merely because the "Jurat" has been deleted is categorically unreasonable, and any contention that the petitioner therefore did not file a tax return is even more so. The petitioner insists that the use of the "Jurat" is not a viable means of assuring the integrity of tax returns. IRS has well known information resources to verify most of the significant figures on the returns, and audits taxpayer records whenever any of the entries appear to be questionnable. Therefore, the petitioner contends that IRS had all of the information necessary to compute the tax on his 1982 return, and that it was a perfectly valid return for that purpose. Consequently, the defendants have utterly failed to establish beyond a reasonable doubt that the petitioner is in violation of 26 USC 6702 paragraph (a)(1)(A), upon which their

entire case depends.

At this point, the judges of this Court should carefully consider the reasons why the petitioner, who has been a most productive taxpayer over the past many years, has regularly deleted the "Jurat" and made the Amendment V entry immediately thereunder on his federal income tax returns. Therefore, the petitioner submits as follows:

1. If the taxpayer signs said "Jurat" unchanged, the courts would undoubtedly construe such action to be a "voluntary" agreement to submit to prosecution for perjury at the option of IRS agents, subject to all of the errors and abuses for which such agents have earned a reputation over the past many years, and this taxpayer does not believe that he can lawfully be compelled to make such an agreement which is contrary to his most fundamental rights.

2. Any taxpayer must claim the Amendment V exemption on each original filing of the federal form 1040 income tax return in order to invoke the protection of said Amendment according to the findings of this Court in Garner Vs. U.S. above cited.

3. To claim the Amendment V exemption without deleting the offensive "Jurat", will not necessarily assure relief from the implications of the perjury prosecution agreement described in item 1 above.

4. Said "Jurat" is not ascribed to under oath according to the traditional law on perjury but, rather, has been substituted in lieu of an oath on the questionnable premise that signing such a statement would assure the integrity of the tax returns in order to facilitate acceptance by IRS agents who are prone to contend that most taxpayers

cheat on their tax returns anyway.

5. Any false statement on the Federal income tax returns is punishable under 18 USC §287 or §1001 on false and fraudulent statements with a more severe penalty than for perjury.

6. It is to be expected that at least some IRS agents are deluded into thinking that the information presented on the tax returns can be relied upon as long as the "Jurat" has been duly signed. This Court should contemplate the extent to which great sums of tax funds may be mishandled because of such thinking.

7. The petitioner, therefore, concludes that the only real purpose of said "Jurat" is to frighten law-abiding taxpayers and that is a disgusting relationship to maintain between the government and its taxpayers who pay

so dearly on behalf thereof.

Consequently, deletion of the "Jurat" and inclusion of the Amendment V entry on the petitioner's Federal income tax returns cannot reasonably be construed as "Conduct due to a position which is frivolous" and the petitioner, therefore, cannot be held liable for the subject penalty under 26 USC §6702 (a)(2)(A). Furthermore, the petitioner has asserted his Constitutional rights by deleting said "Jurat" and invoking Amendment V in connection with which it has been ruled in Miller Vs. US, 230 F 486 at 489 that,

> "The claim and exercise of a Constitutional right cannot be converted into a crime."

and in Sherar Vs. Cullen, 481 F 2d 946 (1973), 9th. Circuit that,

> "There can be no sanction or penalty imposed upon one because of his exercise of Constitutional rights."

Finally, the petitioner did not have any "desire to delay or impede the administration of Federal income tax laws in deleting " the "Jurat" and invoking the protection of Amendment V and the defendants have utterly failed to show beyond a reasonable doubt that the petitioner had any such desire. A refund of $2.043.85 was claimed on the subject tax return, the payment of which the petitioner certainly had no intention to delay or impede. However, the defendants have done an outstanding job of delaying and impeding administration of the law since said refund still remains unpaid and is one of the issues in this suit. There has never been a hearing in any court on this case, no one has ever inquired as to the petitioner's "Desires" in connection therewith, and the presumptions which have been made thereon by the defendants and the courts below can hardly be construed to have been arrived at by due process of law. Furthermore, the Court of Appeals has apparently abandoned this contention since no mention

was made on such "Desire" in their opinion. Therefore, the petitioner cannot reasonably be held in violation of 26 USC §6702 paragraph (a)(2)(B) as alleged by the defendants and it should be conclusively evident that there is no merit whatsoever to any of the allegations which they have made concerning 26 USC §6702 in this case.

The Court should also take notice that there is nothing in 26 USC §6702 pertaining to deletion of the "Jurat", or to alteration of the Federal form 1040 income tax return, notwithstanding legislative history and reminiscences on congressional intent prior to eventual enactment of said section. If the Congress really intended that the penalty prescribed in said section should be applicable to alleged violations of other statutes and, in particular, in the instant case of sections 6061 and 6065, then they should have said so therein in plain and unequivocal language, citing such other statutes by sect-

ion number, and, since they did not, it is wrong for the courts below to hold the petitioner liable for the penalty in §6702 because of alleged violations of §6061 and §6065 for which Congress has apparently neglected to prescribe any penalty. If a person was prosecuted and convicted of burglary, but no penalty for such violation was provided in the burglary statute, would this court apply a penalty out of the rape statute, or some other statute against such person? It should, therefore, be perfectly evident that no court can reasonably expect the petitioner to accept liability for the subject penalty under § 6702 because of an alleged violation of § 6061 and § 6065 under the actual circumstances of this case.

SELECTED CASE LAW CITATIONS

On page 4 of the Opinion of the district court below (see App B-4), the case of US Vs. Sullivan is improperly cited and interpreted in that the petitioner did not

"Refuse to make any return at all". Rather, the petitioner filed a completely detailed return which consisted of fourteen pages meticulously typed and accurately calculated down to the last penny, on which the defendants and all of their attorneys have found no fault except for deletion of the "Jurat" thereon. Said Opinion then continues with an improper conclusion, or inference pertaining to the petitioner's use of the Fifth Amendment notation immediately below the deleted "Jurat" with the statement that, ".....he may not make a blanket Fifth Amendment objection by refusing to attest to the accuracy of his return as a whole". The judge of said court never inquired whether the petitioner thus intended to make such a blanket objection of his return as a whole and, in fact, had ruled that there would be no hearing on this case just prior to issuing the Opinion. To set the record straight, the petitioner had no intention of making a "Blanket Objection" of the return as a whole which he had filed in

considerable detail in order to obtain the refund of $2,043.85 claimed thereon. Rather, the petitioner's use of the Fifth Amendment notation pertained only to the deleted "Jurat", that is, solely to state the reason for the deletion without any other applications intended or implied. In fact, the petitioner has long been aware that such objections to entries on the return must be individually noted at each such entry according to established case law, and he made no such objections on any of the entries on the subject return. Also, the allegation that the petitioner "Refused to attest to the accuracy of his return" is a flagrant perversion of the facts in that the form 1040 "Perjury Statement", which the defendants are intent upon compelling the petitioner to sign for such purpose, is Constitutionally offensive and they have not offered any other statement for that purpose. Furthermore, the petitioner properly signed the form after deleting the "Jurat" for substantial reasons

(which can hardly be described as "Frivolous"), noting the Fifth Amendment objection thereto in full accordance with Garner Vs. US cited herewith, and is nevertheless undoubtedly still liable for making an honest return under penalty of 18 USC §287 and §1001 with or without said statement. The Opinion of this Court in Garner Vs US, 424 US 648 (1976), 96 S Ct 1178 reads in relevant part as follows:

> The Supreme Court decided that one could claim the Fifth Amendment privelege against self-incrimination on a tax return, and that unless the privelege was claimed it would be considered as "waived", and that disclosures voluntarily given on the return would not be considered as "compelled" within the meaning of the Fifth Amendment. The Court acknowledges that a claim of the "privelege" would constitute a defense of a charge of 26 USC § 7203, "Willful Failure to File", since

a valid claim of privelege cannot be the basis for a 7203 conviction. The Court goes on to say that, "The Fifth Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privelege." In a separate but concurring opinion, Justices Marshall and Brennan state, "In discussing this question, the Court notes that only a willful failure to make a return is punishable under 7203 and that a defendant could not properly be convicted for an erroneous claim of privelege asserted in good faith .....since a good-faith erroneous assertion of the privelege does not expose a taxpayer to liability."

The petitioner contends that he made a "Good-faith" assertion of the Fifth Amendment privelege on his 1982 tax return which, whether or not deemed erroneous, cannot be

the basis for a 26 USC §6702 penalty since said "Amendment itself guarantees the taxpayer's insulation against liability imposed on the basis of a valid and timely claim of privelege".

Also, this Court ruled in US Vs Bishop, 412 US 346 (1973) Sup Ct as follows:

> "The requirement of an offense committed willfully is not met, therefore, if a taxpayer has relied in good faith upon a prior decision of this court."

The petitioner submits that the word "Willfully" above may be replaced by the word "Frivolously" without mitigating, or altering the relevance of that opinion in this case.

The petitioner also cites US Vs Lombardo, 228 F 980 which reads as follows:

> ".....to penalize the failure to give a statement which is self-incriminatory is beyond the power of Cong-

ress".

There cannot be any possible doubt that a taxpayer's signature under the offensive "Jurat" empowers IRS agents, at their option, to invoke a prosecution for perjury against the taxpayer who has thereby acted in implied voluntary agreement to such prosecution. The petitioner objects to making such an agreement and contends that the potential of such self-incrimination is a valid basis for the application of US Vs Lombardo as above cited particularly when no questions have been raised as to the honesty of this taxpayer's return.

On pages 5 and 6 of the brief to the court of appeals by the attorneys for the defendants, an entirely spurious argument is set forth to the effect that the petitioner, absent a real danger of self-incrimination, is not qualified to invoke the Fifth Amendment on the subject tax return because it was an honest return and the petitioner

had committed no wrong-doing in connection therewith. The petitioner replied to that argument on page 6 of his Final Brief to the court of appeals with the following statement:

> "As a matter of law, it should be evident that the Fifth Amendment was not composed to shield the guilty, but rather serves to protect the law-abiding citizens from the historically described depredations of the government prosecutors and tax collectors."

The petitioner then continued in said brief as follows:

> "It is not necessary for the taxpayer to be involved in anything incriminatory to invoke the protection of the Fifth Amendment but, rather, it is his fundamental right to do so for any good reason, and it is sufficient to do so because of a potential abuse or

error on the part of the tax collector which may, at any time in the future, become the basis for a criminal prosecution against the taxpayer."

The petitioner then cited, "Internal Revenue Form 1040 and the Fifth Amendment: Self-Reporting or Self-Incrimination, the taxpayer's dilemma", 54 ND L Rev 213, 1977, which authoritatively reviews the applicability of the Fifth Amendment to the Federal income tax returns with frequent reference to Garner Vs US, and a copy of which was attached to the subject brief.

This Court's ruling in Miranda Vs. Arizona, 380 US 436 (1966) Sup Ct is also directly relevant to this case in stating as follows:

"Where fundamental rights under the Constitution are involved, there can be no rule-making or legislation which can abrogate them".

The petitioner contends that the Motions for Dismissal and Summary Judgment via FRCP 12(b) and 56, and the ensuing actions by the courts below to grant and affirm said motions have, indeed, abrogated his fundamental rights, and that 26 USC §6702 as applied to the petitioner in this case is bent upon the same end result.

This Court also ruled in Simmons Vs US, 390 US 389 (1968) Sup Ct as follows:

> "We find it intolerable that one Constitutional right should have to be surrendered in order to assert another".

The above ruling is directly relevant to this case in that the petitioner is under compulsion by the defendants, their attorneys and the courts below to sign the offensive "Jurat" and thereby surrender his First, Fourth and Fifth Amendment rights in order to apply his property rights, namely to make his claim for the $2,043.85 refund due on his 1982

tax return in a manner acceptable to the defendants.

In Marchetti Vs US, 390 US 39 (1968) Sup Ct, and in Grosso Vs US, 390 US 62 (1968) Sup Ct, this Court apparently made identical rulings that the taxpayer is

> ".....not required to file any return at all if incriminating".

The petitioner contends that the "Jurat" on the Federal form 1040 income tax return is indisputably self-incriminating, whether or not the taxpayer who is under compulsion to sign said "Jurat" has committed any wrongdoing in connection with the information required on the return or not, or whether or not the incriminating circumstances are potential or real since control of the initiative is entirely in the hands of IRS agents to determine at their option when the former status becomes the latter. Furthermore, the petitioner contends that the act of deleting

the "Jurat" is inseparably tied to invoking the Fifth Amendment in this case because the "Jurat" is indisputably self-incriminating and the Fifth Amendment is a proper defense against any prosecutions which may result therefrom. While it is, therefore, evident that the petitioner was not required to file any tax return in which the "jurat" remained intact, he nevertheless did file a completely detailed and exemplary return for the purpose of obtaining the refund claimed thereon after deleting the "Jurat" to remove the Constitutional impediment thereby involved. Can this Court rightfully say that admitted gamblers do not have to file any tax return at all, but that the petitioner must pay a penalty and forfeit the $2,043.85 refund due on his 1982 tax return for thus invoking the same Fifth Amendment privelege?

In Marbury Vs Madison, 5 US (1 Cranch) 137, 174, 176 (1803) Chief Justice Marshall declared that:

"All laws which are repugnant to the Constitution are null and void".

which is a clear mandate that does not appear to require any further comment to this Court on its applicability to this case.

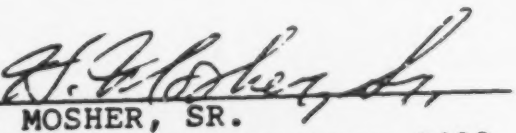
REASONS FOR GRANTING THE WRIT

1. The Court should grant this Writ to correct the gross miscarriage of justice committed against the petitioner by the attorneys for the defendants and the judges of the courts below who have dismissed the petitioner's appeal and granted summary judgment to the defendants without any hearing, or a trial by jury as demanded, which makes a travesty of our most fundamental rights.

2. This case involves issues which are of vital public interest and should be thoroughly reviewed and adjudicated in a public trial before a jury according to the rules of common law.

CONCLUSION

For the foregoing reasons, the undersigned petitioner requests the Court to issue a Writ of Certiorari in order to review the judgment of the Court of Appeals for the Fifth Circuit and thereupon to remand this case to a competent and unprejudiced District Court for a trial by jury according to the rules of common law as demanded in the original complaint.

BY: 

E. H. MOSHER, SR.
5301 Spring Lake Parkway #403
Haltom City, Texas 76117
817/485-5478 Residence (PhoneMate)
817/280-2054 Office

IN THE SUPREME COURT OF THE UNITED STATES

MOSHER Vs. IRS, et al

CASE NO._____

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Petition for a Writ of Certiorari as amended by the Petitioner has been made this 10th. day of March 1986 by mailing two copies thereof to:

Glenn A. Archer, Jr.
Assistant Attorney General

Michael L. Paup
Gary R. Allen
Steven W. Parks
Attorneys, Tax Division
U.S. Department of Justice
Washington, D.C. 20530

BY: E. H. Mosher, Sr.
E. H. MOSHER, SR.
Petitioner

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

E. H. MOSHER, SR.,
Plaintiff-Appellant,

v.

INTERNAL REVENUE SERVICE, ET AL.,
Defendants-Appellees.

No. 84-1918
Summary Calendar

OPINION

Filed October 31, 1985

Before: Politz, Garwood and Jolly, Circuit Judges.

Per Curiam

Appeal from the United States District Court
for the Northern District of Texas
Eldon B. Mahon, District Judge, Presiding

SUMMARY

Taxation/Constitutional Law

Appeal from grant of summary judgment against Mosher. Affirmed.

Mosher filed his 1983 IRS Form 1040 with the jurat crossed out. The IRS assessed a penalty pursuant to 26 U.S.C. § 6702. After paying 15% of the penalty, Mosher filed a claim for a refund which was denied.

[1] Under 26 U.S.C. § 6702, the IRS may assess a penalty on any individual who files "what purports to be" a tax return when such return (a) does not contain information on which the substantial correctness of the self-assessment may be judged, and (2) is based on a frivolous position. [2] Mosher's conduct appears to fall directly within the prohibitions of section 6702 as without the jurat the substantial correctness of the return could not be judged and [3] Mosher struck the jurat clause due to a position which is frivolous. [4] Mosher's allega-

tions that his right to a jury trial and other constitutional provisions were violated are meritless.

OPINION

PER CURIAM:

This case is an appeal to determine whether the district court properly granted summary judgment against the appellant who was assessed a civil penalty under section 8702 of the Internal Revenue Code of 1954 for filing a frivolous tax return. Because we find that the civil penalty was properly assessed, we affirm.

I

The facts in this case are not disputed. On or about April 14, 1983, E. H. Mosher, Sr., the appellant, filed an IRS Form 1040 purporting to be a federal income tax return for 1982. Mosher had filled out the form, claiming a refund of $2,043.85 but crossed out the following language provided in the space for the taxpayer's signature:

> Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Inserted beneath the stricken jurat were the typewritten words: "Violates Amend. V, U.S. Constitution."

The IRS informed Mosher that the Form 1040 could not be processed because it was not properly signed under penalties of perjury and requested that he sign an attached jurat. Mosher refused and the IRS assessed a $500 penalty pursuant to 26 U.S.C. § 6702. After paying $75.00 (15% of the assessed penalty as provided in 26 U.S.C. § 6703(c)), Mosher filed a claim for a refund. The IRS denied the refund claim, and Mosher filed the instant suit in the district court, complaining, *inter alia*, that the penalty was improperly imposed and that he was unjustifiably denied his refund of $2,043.85.

The government filed a motion to dismiss or for summary judgment and submitted a copy of Mosher's 1982 tax return. In opposition to the motion, Mosher claimed that the jurat violated the fifth amendment's prohibition against self-incrimination. Mosher reasoned that since persons charged with perjury in connection with their 1040 tax returns usually plead immunity under the fifth amendment, the jurat serves no useful purpose toward prosecution of alleged violators. As a result, Mosher contended that both the jurat and penalty assessment are frivolous, as well as constitutionally obnoxious. Mosher also asserted that compelling him to sign the jurat violated his right of freedom of speech guaranteed under the first amendment.

The district court concluded that the penalty provisions of section 6702 were applicable and granted summary judgment in favor of the IRS. Mosher appeals and we affirm.

II

Fed. R. Civ. P. 56(c) allows for a summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. When the district court's summary judgment decision is at issue on appeal, all reasonable inferences must be resolved in favor of the party opposing the motion. *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 640 (5th Cir. 1985). "The party who defended against the motion for summary judgment must have his allegations taken as true and must receive the benefit of the doubt when his assertions conflict with those of the movant." *Id.* (citing *E.C. Ernst, Inc. v. General Motors Corp.*, 537 F.2d 105, 108 (5th Cir. 1976)).

Mosher does not dispute that he is required to file an income tax return. The parties agree that a 1982 tax return was filled out except that the language including "under penalty of perjury" above Mosher's signature was crossed out. The government contends, however, that by striking the jurat and thus failing to sign the return under penalty of perjury, Mosher was properly assessed a civil penalty under the frivolous return provisions of 26 U.S.C § 6702.

[1] Under 26 U.S.C. § 6702,[1] the IRS may impose a $500 penalty on

[1]Section 6702 (effective September 3, 1982) provides:

(a) Civil penalty.—If—

any individual who files "what purports to be" a tax return when such return (1) does not contain information on which the substantial correctness of the self-assessment may be judged, and (2) is based on a frivolous position. *Anderson v. United States*, 754 F.2d 1270, 1271 (5th Cir. 1985). Other provisions of the tax code indicate that a taxpayer is prohibited from altering a jurat on a return. *See* 26 U.S.C §§ 6061 and 6065. Section 6061 provides that "any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary." Similarly, section 6065 provides that "any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that is made under the penalties of perjury."

[2] Although this Court has not yet interpreted section 6702 in the context of this specific conduct, Mosher's conduct appears to fall directly within the prohibitions of the statute. First, by crossing out the jurat, Mosher refused to certify that the entries on the form were correct. Without this certification, the IRS could not properly process the return or assess the substantial correctness of his self-assessment. The Tenth Circuit, in addressing this identical issue, held that an income tax return which is not signed under penalties of perjury is invalid and cannot be processed by the IRS. *Borgeson v. United States*, 757 F.2d 1071, 1073 (10th Cir. 1985). That court wrote:

> The absence of the verification precludes the IRS from judging the "substantial correctness" of the return because the

---

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which—

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to—

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500.

(b) Penalty in addition to other penalties. The penalty imposed by subsection (a) shall be in addition to any other penalty provided by law.

> required "information" that the return has been verified under "penalty of perjury" is absent. Therefore, in light of the statute itself and the legislative history, the frivolous return penalty was properly imposed.

Id. See also Green v. United States, 593 F.Supp. 1341, 1343-44 (N.D. Ind. 1984). We agree. "It is well established in this Circuit, however, that the submission of a 'return' from which tax liability cannot be computed does not satisfy the statutory obligation to file." *Knighten v. Commissioner*, 702 F.2d 59, 61 (5th Cir.), *cert. denied*, 104 S.Ct. 249 (1983).

[3] Second, Mosher struck the jurat clause on his Form 1040 "due to a position which is frivolous" within the meaning of section 6702(a)(2)(A). There can be no doubt regarding the status of a tax form that is not verified under penalties of perjury as the Supreme Court held over fifty years ago that an unsworn tax return failed to satisfy the requirements of law. *Lucas v. Pilliod Lumber Co.*, 281 U.S. 245, 50 S.Ct. 297, 74 L.Ed. 829 (1930). Moreover, the Internal Revenue Code requires that returns be verified under penalties of perjury and provides no exception to that rule. Code Sec. 6065. Thus, there is no conceivable legal foundation for striking the jurat and Mosher's action in that regard must be viewed as frivolous as a matter of tax law. Since Mosher's return did not contain information on which the substantial correctness of the self-assessment could be judged, and Mosher's position was indeed frivolous, we conclude that the civil penalty was properly imposed.

[4] In conclusory terms Mosher seeks to justify his position by alleging violations of his right to a jury trial and other constitutional provisions, including the first, fourth, and fifth amendments. These contentions are meritless.

Mosher was not denied a right to a jury trial since no genuine issue of fact remained that required a trial. *Davis v. United States*, 742 F.2d 171, 173 (5th Cir. 1984). Mosher has not shown that the fourth amendment has any relevance whatsoever to these facts. Nor is noncompliance with the tax law protected by the first amendment. *Borgeson*, 757 F.2d at 1073; *Franklet v. United States*, 578 F.Supp. 1552, 1556 (N.D. Cal. 1984), *aff'd*, 761 F.2d 529 (9th Cir. 1985); *United States v. Malinowski*, 472 F.2d 850, 857 (3d Cir.), *cert. denied*, 411 U.S. 970 (1973). The statute is not unconstitutionally vague as a

BEST AVAIL

person of ordinary common sense could understand the conduct that is prohibited or subject to penalty. *See Arnett v. Kennedy*, 416 U.S. 134, 159-63, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974).

III

As the income tax form is frivolous within the meaning of section 6702, the IRS lawfully assessed a $500.00 penalty. Accordingly, the district court properly granted summary judgment in favor of the government; the district court is therefore affirmed.

AFFIRMED.

NORTHERN DISTRICT OF TEXAS
FILED
SEP 25 1984
NANCY HALL DOHERTY, CLERK
BY [signature]
DEPUTY

ABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

E. H. MOSHER, SR.

VS.

INTERNAL REVENUE SERVICE, ET AL.

CIVIL ACTION NO. 4-83-435-E

MEMORANDUM OPINION AND ORDER

The Court has before it defendants' motion to dismiss or for summary judgment, to which plaintiff has filed a response. After carefully considering the briefs, tax returns and other exhibits submitted to the Court, the Court makes the following determination.

I. Background

Plaintiff filed a Form 1040 for tax year 1982 on or about April 14, 1983. The form was completed and reflected that plaintiff

claimed a refund of $2,043.85. Plaintiff signed the form but altered it by striking the jurat in the signature block and inserting the notation "Violates Amend. V, U.S. Constitution." On June 27, 1983 the I.R.S. notified plaintiff that a $500 penalty had been assessed against him under 26 U.S.C. § 6702 for filing a frivolous tax return. Plaintiff was advised of the procedure for appealing assessment of the $500 penalty, as provided in 26 U.S.C. § 6703. He subsequently submitted a Form 843 claim for refund of the penalty and a check for 15% of the penalty assessed. When the I.R.S. denied his request for refund, he filed this suit seeking to recover the refund of $2,043.85, the $75 paid toward the penalty, damages and attorneys' fees.

II. Discussion

Plaintiff asserts that § 6702 is unconstitutionally vague, that a tax return which does not contain a jurat in compliance with 26

BEST AVA

U.S.C. § 6065 is not a frivolous tax return with the meaning of § 6702 and that the requirement that a taxpayer attest to the accuracy of his return under penalty of perjury violates the Fifth Amendment right against self incrimination. Defendant moves for summary judgment on the ground that by striking the jurat from his tax form, plaintiff filed a frivolous tax return in violation of § 6702. Accordingly, the I.R.S. argues that the $500 penalty was properly assessed, so that plaintiff is not entitled to a refund of the $75 paid toward the penalty, damages or attorneys' fees. After considering the motion, the briefs filed by the parties and plaintiff's tax returns, the Court finds that plaintiff's claims are meritless, that no issue of fact exists and that, as a matter of law, defendant is entitled to judgment.

Section 6702 provides in pertinent part:

(a) Civil penalty.--If--

LABLE COPY

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which --

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to--

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500.

Pursuant to 26 U.S.C. § 6065, any return required by the Internal Revenue Code must be verified by a written declaration that it is

BEST AVAIL

made under penalties of perjury. A return not signed under penalty of perjury is not a valid return and the I.R.S. is not required to process such a return. Commissioner v. Pilliod Lumber Co., 281 U.S. 245, 248 (1930); United States v. Moore, 627 F.2d 830, 834 (7th Cir. 1980); Cupp v. Commissioner, 65 T.C. 68, 78-79 (1975), Aff' d unpub. mem. (3rd Cir. June 10, 1977).

Section 6702 provides for imposition of a civil penalty if the tax return "does not contain information on which the substantial correctness of the self assessment may be judged" and where the taxpayer's actions are the result of a frivolous position or a desire to impede the administration of the tax laws. The legislative history of § 6702 reflects that it was intended to apply to tax returns containing alterations and to returns in which insufficient information to calculate the tax is given. S. Rep. No. 494, 97th Cong., 2d Sess., at

278. Because plaintiff refused to attest that to the best of his knowledge the information on the return is correct and complete, his return was not valid and could not be processed by the I.R.S. Moreover, without this certification the I.R.S. could not determine the correctness of plaintiff's self assessment.

Plaintiff raises two constitutional challenges to the government's assessment of the $500 penalty. First, he asserts that the statute is unconstitutionally vague. However, the Court finds that a person exercising ordinary common sense can sufficiently understand and comply with the provisions of the statute. Arnett v. Kennedy, 416 U.S. 134 (1974). Further, plaintiff asserts that the requirement that he attest to the accuracy of the information contained on his tax return violates the Fifth Amendment proscription against self incrimination.

BEST A

This claim is without merit. In United States v. Sullivan, 274 U.S. 259, 263 the Supreme Court said:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all.

Accordingly, although plaintiff may claim a privilege to particular questions, he may not make a blanket Fifth Amendment objection by refusing to attest to the accuracy of his return as a whole. United States v. Daly, 481 F.2d 28 (8th Cir. 1973). As discussed above, a return which is not signed under penalty of perjury is not a valid return and will not be processed.

Accordingly, after considering the motion, briefs and other matters submitted to the Court, the Court finds that there is no genuine

AVAILABLE COPY

issue of any material fact and that the defendant is entitled to judgment as a matter of law. It is ORDERED that defendants' motion for summary judgment is GRANTED.

Signed this 25th day of September, 1984.

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
SEP 25 1984
NANCY HALL DOHERTY, CLERK
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

FORT WORTH DIVISION

E. H. MOSHER, SR.

VS.

INTERNAL REVENUE SERVICE, ET AL.

CIVIL ACTION NO. CA 4-83-435-E

JUDGMENT

This action came on for decision on defendant's motion to dismiss or for summary judgment before the Court, Honorable Eldon B. Mahon, U.S. District Judge, presiding, and the issues having been rendered, it is

ORDERED and ADJUDGED that plaintiff's action be dismissed on the merits and that the parties bear their own costs of action.

Signed this 25th day of September, 1984.

UNITED STATES DISTRICT JUDGE

(R. 14.) The remainder of the Form 1040 contained entries in the spaces provided for income, deductions, credits, and tax withheld, and claimed a refund in the amount of $2,043.85. (R. 14.)

In a letter dated June 30, 1983, the Internal Revenue Service notified taxpayer that the Form 1040 filed by him for 1982 could not be processed because it was not properly signed under penalties of prejury. (R. 10.) Accordingly, the letter requested that taxpayer sign an attached jurat to become a permanent part of taxpayer's return. Taxpayer refused. (R. 12.) The Internal Revenue Service thereupon assessed a $500 penalty against taxpayer pursuant to Section 6702 of the Internal Revenue Code of 1954 (26 U.S.C.). (R. 7.) After paying $75 of the amount assessed, taxpayer filed a claim for refund of that amount pursuant to Code Section 6703(c). (R. 8) On the denial of that claim, taxpayer

filed the instant suit in the District Court, claiming principally that the penalty was improperly imposed and that the refusal of the Internal Revenue Service to process his return unjustifiably denied taxpayer of his refund of $2,043.85, that Section 6702 was vague and ambiguous, that striking the jurat did not constitute a violation of Section 6702, and that imposition of the penalty violated taxpayer's First and Fourth Amendment rights. (R. 1-6.) Taxpayer also sought an injunction directing the Internal Revenue Service to refund the $2,043.85 claimed by taxpayer and damages against the Internal Revenue Service. (R. 5-6.)

The Government filed a motion to dismiss or for summary judgment on the ground that since the jurat was stricken the Internal Revenue Service could neither process the return nor adjudge the substantial correctness of the self-assessment reflected thereon,

IN THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

MOSHER Vs. IRS, et al CIVIL APPEAL NO. 84-1918

RESTATEMENT OF THE FACTS

On page 3 of the appellee's brief, the facts pertaining to issuance of the subject assessment have been grossly misrepresented in contending that a letter of notice (R. 10) was sent to the appellant requesting signing of an attached "Jurat", that taxpayer refused (R. 12), and that the subject penalty assessment (R. 7) was thereupon issued in that order. Actually, the appellant received the Notice of the Penalty Assessment (R. 7), dated 6/27/83, two days before receiving the letter (R. 10) dated 6/30/83. The letter made no mention of the assessment, apparently

was unrelated, and certainly was not a prior notice of the assessment as implied by the attorneys for the appellee's. It should, therefore, be evident from the above cited documents that the defendants acted in a summary manner in issuing said penalty assessment without any notice before hand, that the R. 10 letter is not a notice relevant to said penalty but was transmitted as an after-thought, after the fact of the assessment, without affording the appellant any opportunity to negotiate the dispute which has since brought this matter to this Court.

The appellant's letter reply (R. 12) to the above (R. 10) letter concluded with the statement that, "However, you apparently think that you have the power to compel me to sign the offensive 'Perjury' statement despite my objections. If so, then you should

clearly cite the statutory basis of such authority before you can expect me to reconsider my position on this subject." That is certainly not a statement of refusal and the Court should not, therefore, accept the statement by the attorneys for the appellees that, "Taxpayer Refused". Furthermore, even if that statement is construed to be tantamount to a refusal, it was made about three weeks after the issuance of the penalty assessment and obviously had no bearing on that action.

Upon reviewing 26 USC 6702 on "Frivolous" tax return penalties with the aid and advice of an attorney, it was evident that the appellant had done nothing which could reasonably be construed to constitute a violation of said section. The appellant thereupon filed a Form 843 Claim (R. 8), enclosing $75.00 in partial

payment of the assessment with the comment that, ".....the basis for the penalty remains a mystery". Subsequently, the appellant received a letter (R. 13) from the defendants which "Fully Disallowed" the Form 843 Claim on the erroneous basis that, ".....your claim was based upon moral, political, constitutional, conscientious, or religious grounds", whereas the appellant had only said, ".....the basis for the penalty remains a mystery".

Consequently, the appellant filed suit in the court below pursuant to 26 USC 6703, which included a petition for a trial by jury in the last sentence of the first paragraph of the complaint (R. 1-6). 26 USC 6703 commences as follows:

> (a) Burden of Proof. In any proceeding involving the issue of whether or not any person is liable for a penalty under

BEST AVAILABLE C

OPY

CONSTITUTION OF THE UNITED STATES

ARTICLE VI, SECTION 1

SUPREME LAW OF THE LAND

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

AMENDMENT I

RESTRICTION ON POWERS OF CONGRESS

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

AMENDMENT IV

SEIZURES, SEARCHES AND WARRANTS

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized.

AMENDMENT V

CRIMINAL PROCEEDINGS CONDEMNATION OF PROPERTY

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public

use without just compensation.

AMENDMENT VII

TRIAL BY JURY

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.

AMENDMENT XIV

CITIZENSHIP, REPRESENTATION AND PAYMENT OF PUBLIC DEBT

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 38: JURY TRIAL OF RIGHT

(a) Right Preserved. The right of a trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of a party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all of the issues so triable.

RULE 39: TRIAL BY JURY OR BY THE COURT

(A) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

APPENDIX F-2